UN-AMERICAN CHARACTER OF RACE LEGISLATION

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The above title is designed to express condemnation of legislation discriminating against particular races, and hence the objections to special legislation, commonly called by the ambiguous phrase "class legislation," as far as based on *race distinctions,* will be here considered. Proper classification, and not race discrimination, ought to underlie legislation. As applied to immigration laws, this objection seems to have been first authoritatively formulated by President Roosevelt and his able Secretary of Commerce and Labor, Oscar S. Straus, in official messages presently to be considered, but in principle such legislation is really inconsistent with the fundamental basis on which our government rests.

The war against negro slavery in the United States was conducted upon this same principle. At the Republican National Convention of 1860, before Lincoln was nominated, Joshua R. Giddings moved that the proposed party platform be amended by incorporating therein the preamble of the Declaration of Independence, in order to indicate clearly that the anti-slavery campaign was merely in harmony with that great declaration of human rights and human equality, and after this resolution had failed on account of ultra-conservatism, George William Curtis renewed the motion in slightly modified form, "daring," in the language of his biographer,[1] "the representatives of the party of freedom meeting on the borders of the free prairies in a hall dedicated to the advancemnt of liberty, to reject the doctrine of the Declaration of Independence, affirming the equality and defining the rights of men; the speech fell like a spark upon tinder, and the amendment was adopted with a shout of enthusiasm."

Similarly, Charles Sumner, the father of our "Civil Rights" legislation, constantly invoked the principles of the Declaration of Independence in support of his proposed measures, as also in his

[1]Cary's Curtis, pp. 134-5; compare Carl Schurz's Memorial Address in honor of Curtis, December 7, 1903.

appeal to strike out color distinctions from our naturalization laws, when the negro was being enfranchised, but the Mongolian was still being discriminated against. "It is 'all men,' and not a race or color, that was placed under protection of the Declaration, and such was the voice of our fathers on the 4th of July, 1776," he argued in the United States Senate on July 4, 1870.[2] So, also, in the leading case of Yick Wo *vs.* Hopkins, 118 U. S. 356, the Supreme Court of the United States, with Justice Stanley Matthews as its spokesman, followed the utterances of the fathers of the republic, in reversing a decision of the California Supreme Court, and determined that a San Francisco ordinance was violative of the fourteenth amendment of the federal constitution in providing that it should be unlawful for persons to engage in the laundry business within that city, without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone, under cover of which Chinese laundrymen were forbidden to transact their business, unlike those of other races. Said the court: "The fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men.' . . . Class legislation, discriminating against some and favoring others, is prohibited, but legislation which in carrying out a public purpose is limited in its application, if within the sphere of its operation it affects all persons similarly situated, is not within the amendment." Even the form of the ordinance, which concealed its ulterior anti-Chinese purpose, was penetrated by the court, in ferreting out its illegal, discriminating character.

Curiously enough, little has been written even upon class legislation in general, much less concerning legislation based upon race discriminations. The agitation against such special legislation, though it has found expression within certain limits in the fourteenth amendment to the federal constitution, in federal statutes and treaties, and in constitutional provisions in various states, for-

[2]See works of Chas. Sumner, Vol. XIII, p. 482. See also XIV, 286, 301; XV, 355.

bidding anything except general legislation, upon various subjects, is, however, comparatively recent in origin, despite such isolated utterances as have been cited. Mr. Bryce, in his "American Commonwealth," writing in 1888, well points out that such prohibitions began to be adopted only during fifteen years preceding that date, approximately, and the fourteenth amendment was of course framed in consequence of our Civil War. The federal "civil rights" acts were passed to carry this amendment into effect, and various states thereafter adopted similar laws themselves. These restraints, such as they are, apply almost exclusively to our state governments merely, and do not affect the federal government or its agencies. Our "Bill of Rights" provisions were aimed at abuses with which the fathers of our republic were familiar, and excessive, unwise, discriminating legislation, was not then prominent among the evils thus to be avoided. In fact, we are all too prone, in these days of never-ceasing legislative activity, to overlook, in the language of Henry Sumner Maine, "how excessively rare in the world was sustained legislative activity till rather more than fifty years ago" (written in 1885), "that the enthusiasm for legislative change took its rise, not in a popularly governed country, not in England, but in France," and was quickened particularly by Rousseau's conception of the "omnipotent democratic state, rooted in natural right, which has at its absolute disposal everything which individual men value, their property, their persons and their independence," and by Bentham's plan of lodging legislative direction in the greatest number of the people, in the expectation that in employing this power in accordance with their will, they will legislate for and effect the greatest happiness of the greatest number.[3]

In fact, with the exception of discriminations against the negro, we had extremely few enactments based upon race distinctions upon our statute books until our Civil War period, and those that existed were nearly all survivals of the common law. Even our "Alien and Sedition Laws," adopted in 1798, largely through fear that we would be embroiled in the intense foreign wars then raging, which were proving so injurious to us and our commerce, were denounced in the Kentucky and Virginia resolutions drafted by such statesmen as Jefferson and Madison, and resulted in large degree in encompassing the ruin of the unpopular party which stood sponsor for

[3]Maine: "Popular Government," 2d ed., p. 127 *et seq.*

them, and did not encourage our chief political parties to attempt further legislation against aliens in general nor individual races in particular, even in the days of "Know-Nothingism."[4] It is in fact true, generally speaking, that our legislative race discriminations have been confined almost entirely to enactments against the negro, against the Chinese, and latterly also against the Japanese. Though to-day our anti-Chinese laws happen to be largely federal in character, the structure of our government, with its checks and balances, has made the federal government the chief bulwark against such discriminatory legislation, thanks to constitutional provisions in the shape of the fourteenth amendment and treaties which under the constitution are the "supreme law of the land." Again and again have federal treaties with foreign governments been successfully invoked, from the beginning of our history on, to override state discriminations against aliens, including such common law disabilities as made an alien incapable of owning land.

The anthropologist tells us that the formation of the tribe or race was a step in the progress of man, and that originally, each tribe or race protected only its own members, and viewed all outside of its fold not merely with suspicion, but with dislike and hatred. In the progress of civilization the laws were recast so as to remove racial discriminations, and to protect all classes. This progress was effected largely through treaties with particular countries, granting their citizens and subjects full rights, until nearly all civilized men became united together by such ties, and race discriminations became rare exceptions. In fact, our own country, above all, has been in the van in combatting race antagonisms. Says Professor Shaler in his extremely suggestive book, "The Neighbor:"[5] "As soon as an ethnic society is organized, it takes on many of the characteristics of the primitive animal individual, it lives for itself alone. Other groups of like nature are its enemies to whom no faith of any kind is owed. To plunder them is not theft, to slay those who are of them is not murder, they are outside of the pale of all obligations whatever. . . . The most significant peculiarity of the American people, that which in my opinion sets them more apart from the rest of the world than any other, is the relative absence

[4] See the interesting summary by John Bach McMaster of "The Riotous Career of the Know-Nothings," in his collection of essays entitled "With the Fathers."

[5] Pp. 42, 43-4.

of the tribe-forming motive among them. While in Europe there is a general tendency to disbelieve in all men, even of the same race, who are not well known—a humor which is least, but still discernible in Great Britain, and increases to the lands about the Mediterranean—in the United States there is hardly more than a trace of this humor and that appears to be steadily lessening. In general, the American is characterized by an almost unreasonable belief in the likeness to himself of the neighbor, however far parted by race, speech or creed. This is so strong that even the Civil War did not shake it; it served rather to affirm the mutual confidence." Even Professor Shaler, however, notes certain exceptions to this tendency, notably in our attitude towards the negro, and to these should be added our anti-Chinese and anti-Japanese enactments.

As already indicated, the discriminations against aliens and particular alien races were originally removed chiefly by means of treaties with different foreign nations, but for most purposes, such treaties had become so general, prior to the organization of our country, that most of the common law disabilities had been regarded as removed, even independently of specific treaties, because of the growth of commerce and friendly relations between states. This circumstance is clearly indicated by such an early leading case as Ormichund *vs.* Barker,[6] decided in 1775, where the right of a Gentoo residing in the East Indies to be sworn in an English lawsuit according to the ceremonies of his own religion, was sustained, despite early authorities to the contrary, because required by the modernized common law, which considers the requirements of an expanding foreign commerce. Despite Lord Coke's statement that "all infidels are in law perpetual enemies, for between them, as with the devils, whose subjects they are, and the Christians, there is perpetual hostility and can be no peace," Justice Willes remarked: "But this notion, though advanced by so great a man, is, I think, contrary not only to the Scripture, but to common sense and common humanity. I think that even the devils themselves, whose subjects he says the heathens are, cannot have worse principles; and besides the irreligion of it, it is a most impolitic notion, and would at once destroy all that trade and commerce, from which this nation reaps such great benefits."

[6]Willes Repts., 538. Compare the very able recent opinion of the New York Court of Appeals written by Judge Cullen in Brink *vs.* Stratton, 176 N. Y. 150, holding it to be a violation of the Constitution to ask a witness if he is an agnostic.

There was, however, an occasional disability on the part of aliens which survived, such as incapacity to own land, and this was removed as to most foreign nations by treaties which our government entered into from time to time. These treaties, as will be further seen hereafter, have also nullified numerous state laws and even constitutional provisions, which have been enacted from time to time, to curtail the rights and privileges of various races which happened to become unpopular for one reason or another, notably the Chinese. Many of the decisions of the Supreme Court of the United States and other tribunals to this effect may be found collated in such works as Professor Moore's "Digest of International Law,"[7] Butler's "The Treaty Power" and the numerous articles and treaties called forth by our recent Japanese separate school agitation, notably papers contained in the "Proceedings of the American Society of International Law at its First Annual Meeting, April 19 and 20, 1907." So common have treaties safeguarding rights of alien subjects become, that we have been compelled to insert in many treaties provisions according to subjects of particular countries all the rights of the most favored nation, with resulting complications with respect to particular "reciprocity" treaties or the like, which the courts have been compelled to hold granted special privileges for special considerations, and were not intended to be embraced by grants of all the "rights of the most favored nation."

But this particular form of "race legislation" scarcely falls within the scope of the present paper. Of course, our Supreme Court has held that our treaties cannot reasonably be construed as preventing the enactment of general statutes for the exclusion of alien paupers likely to become public charges or alien convicts or diseased persons.[8] We have also, on occasion, made special provision in our treaties for the naturalization of aliens who are not covered by our general naturalization laws, for the latter were, curiously enough, limited to *white* persons originally, and the only other classes added thereto are persons of "African nativity or descent," so that the yellow races, including Chinese, Japanese, Burmese, Indians and others (but not the copper-colored native Mexicans), are generally regarded as incapacitated from naturalization,[9] though this discrimination was doubtless intended originally

[7] Vol. IV, Sections 534-578.
[8] The Japanese Immigrant Case, 189 U. S. 86.
[9] Rev. St. U. S., Sec. 2169.

only against Negroes and Indians in tribal organization.[10] This item further indicates how indefinite and uncertain the meaning of some of this race discriminatory legislation is, in view of ever-changing opinions as to anthropology and ethnic classification. Note, for instance, Professor Wigmore's scholarly article in the "American Law Review" (1894), "American Naturalization and the Japanese," denying that the Japanese are Mongolians, which would itself have disposed of the controversy on the California law for separate schools for Mongolians.

Reference has already been made to the fact that the leading exceptions to our general policy against race discriminations in legislation have been furnished by the negro, the Chinese and the Japanese races. As regards the negro, we built up a mass of discriminations running counter to our English common law of the most far-reaching and serious character which it required the sacrifice of blood and treasure of the Civil War to overcome. Many of these discriminations may be conveniently studied in Hurd's "Law of Freedom and Bondage." The fourteenth amendment to the federal constitution had the effect of making the most serious of these null and void, not merely in favor of the negro, but in favor of other races and classes also.

Following in the wake of this amendment, civil rights bills were enacted by our federal congress and in several of the leading states of our country, affirmatively forbidding, under heavy penalties, discriminations on account of race or color, even in the use of inns, conveyances, theatres, etc., clearly indicating our national attitude towards such discriminations, even on the part of quasi-public agencies. But some of these federal provisions were declared unconstitutional as an encroachment upon state power,[11] though as state enactments they have been quite generally sustained in jurisdictions which enacted them.[12] Numerous state enactments, discriminating against certain races, particularly the three designated

[10]Compare paper by the writer on "Naturalization and the Color Line" in the "Journal of Am. Asiatic Association," February, 1907.

[11]The Civil Rights Cases, 109 U. S. 3.

[12]See People *vs.* King, 110 N. Y. 418; Baylies *vs.* Curry, 128 Ill. 287; Commonw. *vs.* Sylvester, 13 Allen (Mass.), 247; Ferguson *vs.* Gies, 82 Mich. 358; Cyclopedia of Law and Procedure, Vol. 7, p. 158, *et seq.*, "Civil Rights;" Vol. 8, p. 1073-4, Constitutional Law, "Equal Protection of Law;" General *vs.* Special Acts, Vol. 14, Lawyers' Reports Annotated, 583; 2 L. R. A. 577; 7: 194; 11: 492; 14: 566; 6: 621; 21: 789.

ones, have been held to be unconstitutional in state or federal courts because of the federal constitutional and treaty provisions referred to, or because violative of state constitutional provisions against special legislation and denials of equal protection of the law.

The fact remains, however, that a large number of statutory distinctions on race lines, particularly as applied to the negro, have been sustained, chiefly in southern states, on the theory that illegal "discriminations" are not involved, if equal but separate and distinct facilities for different races are afforded, with respect to street and railroad cars, steamships, restaurants, theatres, schools and the like. In justification of such enactments, applicable particularly to the Negro, reference has been made to alleged differences in education, character, standing and habits of the two races, and fear of endangering white man's control of our institutions and government, if any different course were pursued. The post-bellum cases are being analyzed and collated in an extremely interesting series of articles on "Race Distinctions in American Law," by G. T. Stephenson, in the "American Law Review," beginning with the January-February, 1909, issue, and one of them has also appeared recently in the "American Political Science Review" for May, 1909, entitled "The Separation of the Races in Public Conveyances." It is difficult, however, to escape the conclusion that they are inconsistent with the spirit of American government.

Our federal Chinese exclusion laws date from 1882 on, though we have had federal enactments against enforced, involuntary introduction of "coolies" from China, Japan or other Oriental countries from 1862 on.[13] The decisions of the Supreme Court of the United States have repeatedly and emphatically recognized what was conceded in our diplomatic negotiations and in our legislative debates, that "it is the coming of Chinese laborers that the act is aimed against"[14] merely, and the danger of competition from cheap coolie labor is the sole attempted justification for such laws requiring serious consideration.

Even in legislating for the exclusion of Chinese laborers, treaty faith and moral obligations required exemption of those who had *bona fide* come over in reliance upon the express provisions of the Burlingame Treaty of 1868 with China, whether laborers or non-

[13]See Rev. Statutes U. S., Sections 2158 to 2164.
[14]U. S. *vs.* Mrs. Gue Lim, 176 U. S. 459, 467.

laborers. By that treaty we had welcomed such immigration in express terms not paralleled in any convention with any other country, having even employed the opportunity to preach a text to China and the world concerning, to use the language of Article V, "the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantages of the free migration and emigration of their citizens and subjects, respectively, from one country to the other, for purposes of curiosity, of trade, or as permanent residents." We also guaranteed, in Article VI, to "Chinese subjects visiting or residing in the United States, the same privileges, immunities and exemptions in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation."

Exemption under the constitution also had to be made of persons of Chinese extraction born here. Alleged difficulties in the enforcement of these laws and attempted evasions thereof—scarcely sustained, however, by our official government census, which recorded 105,465 Chinese residents in 1880, 106,000 in 1890 and only 93,000 in 1900, with 70,000 the present official estimate of the Department of Commerce and Labor—led to legislation for the registration of all resident Chinese laborers, under heavy and previously unheard-of extra-constitutional penalties, and danger of arrest of all Chinese, on the claim that they should have registered, and stringent, often unobtainable, proof on the part of all non-laborers was demanded. The law was administered on the theory that only "teachers, students, merchants or travelers from curiosity" may enter. The exclusion of "bankers," "traders," physicians, actors, etc., because not affirmatively enumerated, was ordered. The determination by administrative officers of all applications to enter was made final, with no right of resort to the courts on the difficult and important questions of law and fact involved, even with respect to claims to American citizenship. Uncontradicted evidence was disregarded in a way not sustained in any other class of cases; arrest and detention and a shifting of the burden of proof upon defendants, wholly abhorrent to our Anglo-Saxon system of jurisprudence, was practiced and held to be constitutional, despite bills of rights, on the theory that the right to exclude and expel aliens may be pursued by extra-constitutional methods. In short, there was instituted a constant reign of terror for all Chinese or

alleged Chinese residents, laborers or non-laborers. Their liberty is constantly jeopardized by harsh and oppressive laws, and their property is accordingly also endangered under the sentiment thereby engendered that they are beyond the protection of our laws. Only one who, like the writer, has become familiar in practice with the injustice and barbarity of these laws in their actual practical workings, can realize that such practices can exist amid our boasted American civilization. The Chinese have little access to our public prints and have substantially no votes, and when even their officials, vehemently but righteously decline to join in doing honor to a military officer who had made an unauthorized extension of these anti-Chinese enactments to our new Asiatic possession, to breed such race prejudice on that continent, too, they become *persona non grata!*

Mr. Bryce, in his "American Commonwealth," published an interesting chapter entitled "Kearneyism in California," in which he showed how the unfortunate Chinaman became a victim of political exigencies which enabled his economic rivals, or rather persons who were led by interested leaders to believe that they were his rivals, to "deliver" control of the State of California to those who would most effectively discriminate against him. Already in 1855 and 1858 California passed laws to exclude Chinese immigrants, which its courts declared unconstitutional,[15] and in 1878 the United States Supreme Court was compelled to declare unconstitutional a California statute, passed some years before, covertly aiming to exclude Chinese persons by state agencies,[16] and both parties in the national election of that year demanded Chinese exclusion. Federal treaties and constitutional provisions annulled many hostile discriminatory state statutes and municipal ordinances, and it became obvious that federal legislation alone could accomplish this purpose.

President Hayes declined to yield to this clamor, in the absence of Chinese consent to a modification of the subsisting treaty, which would have been thereby violated, and vetoed a bill to restrict Chinese immigration for this reason on March 1, 1879.[17] In his able veto message he said, even as to the time anterior to the Burlingame

[15]People *vs.* Downer, 7 Calif. 169.
[16]Chy Lung *vs.* Freeman, 92 U. S. 275.
[17]Veto Messages of the Presidents, p. 414.

Treaty: "Up to this time our uncovenanted hospitality to immigration, our fearless liberality of citizenship, our equal and comprehensive justice to all inhabitants, whether they abjured their foreign nationality or not, our civil freedom and our religious toleration had made all comers welcome," but, in the light of the new conditions, he pointed out that a remedy could properly be found only in the negotiation of a new treaty, to permit the restriction of Chinese immigration consonant with international faith. China was thereupon induced to enter into the treaty of 1880, by which she consented to measures by which the United States was permitted "to regulate, limit or suspend such coming (of Chinese laborers), but . . . not absolutely prohibit it," "the limitation or suspension shall be reasonable, and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitation."

Under authority of this treaty we passed our first Chinese exclusion act, dated May 6, 1882, after President Hayes, on April 4th of that year, had vetoed another bill which violated the treaty, but the agitation did not cease. In 1884, under cover of "protecting" non-laborers, we violated the treaty by prescribing a statutory certificate for non-laborers, which is difficult to obtain, will not suffice if the officials made it out incorrectly in any way, or did not also authenticate a translation, and may be demanded as exclusive method of proof at any time, under penalties of arrest and deportation. Soon the theory of exclusive enumeration of non-laborers in this treaty of 1880 was developed, to bar "traders," "bankers," "manufacturers," etc., on the theory that they are not non-laborers.

The violations of treaty effected by the act were carried still further by the act of October 1, 1888, which invalidated our official return certificates, armed with which Chinese laborers or alleged non-laborers had gone to visit China on business or pleasure, and also prevented Chinese wives or children from joining or rejoining husbands or fathers.

This was followed by the well-known "Geary Law," with its requirements for registration under heavy penalties, and extra-constitutional methods of expulsion in addition to exclusion. It authorized arrest without warrant or oath, by methods unconstitutional in all other cases, and shifted the burden of proof to the defendant, in violation of our whole Anglo-Saxon methods of jurisprudence.

Then there came the act of November 3, 1893, giving an arbitrary and unjust definition of "merchant," and requiring white testimony, commonly impossible to secure, and proof of non-laboring by a "universal negative," which logicians teach us it is always impossible to establish. The act of 1894 made the decisions of the immigration officials—commonly ignorant, biased petty officials, acting as both advocates and judges—on the complicated questions of law and fact involved in applications for entry, whether right or wrong, non-reviewable in the courts, with the result that thousands of Chinese persons were unjustly dealt with, before the courts could decide some of these questions, in collateral proceedings, in their favor. Next the act of 1902 legalized the then subsisting situation as to the enforcement of these harsh laws in our insular possessions also.

The treaty with China of 1894, by which China is supposed to have consented to the Geary law provisions in a clause in unconscious irony describing them as passed for the benefit of Chinese laborers "with a view of affording them better protection," in return for authorization of return of Chinese laborers resident here, visiting China for brief periods under onerous condition, was terminated by China pursuant to its terms in 1904, making the violations of treaty faith guaranteed by the subsisting treaties of 1868 and 1880 worked by subsisting statutes, now still more glaring. As to the much-discussed exclusive enumeration theory of classes of non-laborers, who alone are permitted to enter, it is interesting to turn to the treaty negotiations themselves and to the testimony of Chester Holcombe, secretary and interpreter to this very treaty commission, to learn that no such result was intended, and the decision of Judge Ross to the contrary[18] in California in U. S. *vs.* Ah Fawn, 57 Fed. Rep. 591, approved by the Circuit Court of Appeals of that Circuit in Lee Ah Yin *vs* U. S., 116 Fed. Rep. 614, is of extremely doubtful correct-

[18]Holcombe: "The Question of Chinese Exclusion," "Outlook," July 8, 1905, and "Coolies and Privileged Classes," by the present writer, in "Journal of Am. Asiatic Association," March, 1906; on the general question of Chinese Exclusion, see also the present writer's paper in the "New York Times," Nov. 24 and 25, 1901, reprinted in Senate Document No. 106, 57th Congress, 1st Session; also his papers "Our Chinese Exclusion Policy and Trade Relations with China," "Journal Am. Asiatic Association," June, 1905, and July, 1905. See also Moore's "International Law Digest." Vol. IV, Sections 567-568; Butler's "The Treaty Power" and U. S. Senate Report and Testimony on Chinese Exclusion, No. 776, 57th Congress, 1st Session, 1902, as well as Letter from Minister Wu Ting Fang, printed as Senate Document No. 162, 57th Congress, 1st Session.

ness; the U. S. Supreme Court has never passed upon the question, and in fact seems to have thrown doubt on the correctness of the contention. (U. S. *vs.* Mrs. Gue Lim, 176 U. S. 459, 463.)

Both President Roosevelt and Secretary Straus have officially condemned the principle as unwise. Of course, however, both executive and law officers of the government find themselves compelled to follow these unreversed judicial decisions, especially in a matter having such important political bearings, even when against their own judgment. This circumstance accounts for much oppression in the enforcement of these laws.

It should, moreover, be remembered that even the Supreme Court is bound to enforce a statute, though it be clearly inconsistent with a prior treaty, despite our responsibility in the forum of international law and the resulting moral obliquity, and the court has several times contented itself with placing the responsibility where it belongs. One of the most serious consequences of such legislation is, moreover, the spirit it engenders of breach of national faith at the behest of supposed temporary expediency. Moreover, in making these laws peculiarly racial, by expressly making them applicable even to persons of Chinese extraction who are subjects of other nations,[19] we have violated treaties with other countries as well, and run the risk of further international entanglements.

A reference in passing to recent statutes authorizing the expulsion, within three years after landing, of any aliens for alleged specified causes by mere administrative action, with right denied of judicial review, indicates how invidious is the atmosphere which engenders such legislation. It creates a dangerous condition for all aliens and alleged aliens, in placing their rights on an administrative footing inferior to those of citizens, contrary to the American spirit.[20] On the other hand, as regards Chinese residents, it should not be forgotten that the statutory discriminations against them and their testimony and their subjection to irresponsible petty executive officers, has created a spirit of disregard for their persons and property of a very far-reaching character, and has resulted in their often becoming the victims of official bribery and extortion, to which Oriental races may be peculiarly susceptible. This cannot be measured

[19]Sec. 15 of the act of July 5, 1884.

[20]The Japanese Immigration Case, 189 U. S. 86, Justices Brewer and Peckham dissenting.

merely by the already appreciable number of convictions and dismissals of government officials for these causes, that happen to have taken place. It is but fair to say, in this connection, that there have been but comparatively few wholesale arrests of resident Chinese under our exclusion laws since the famous Boston raid of Sunday, October 11, 1902, when about 250 Chinese persons, in fact all the Chinese residents of Boston who could be found, were simultaneously arrested, nearly all to be subsequently discharged, after sustaining gross hardships and injuries. Hon. John W. Foster has ably described this contemporary imitation of the "Black Hole of Calcutta," and the large public meeting of protest in Fanueil Hall following it, in an article on "The Chinese Boycott," in the "Atlantic Monthly," January, 1906.

It was thought by the present writer than an account of the conditions created by these legislative race discriminations by one like himself, familiar with them for fifteen years might be more effective than any generalizations and abstract arguments.

Fortunately, the dangers from attempting to include the Japanese in these same special measures at the behest of a recently aroused anti-Japanese sentiment on the Pacific Coast have, for the time at least, been averted, by securing friendly action on the part of the Japanese government at home in the direction of preventing Japanese laborers from immigrating to the United States. This is accompanied by an enactment of general applicability, adopted February 20, 1907, for the exclusion of persons covered by Presidential proclamation, who are required by their own laws to secure passports to come to the United States. The reports of the Commissioner General of Immigration for the years ending June 30, 1907 (pp. 72-76), and June 30, 1908 (pp. 125-128), and of Secretary Straus for 1908 show how effective these regulations have been, not simply in excluding applying aliens of the class in question, but in preventing them from even applying or attempting to enter. In connection with proposed Japanese exclusion, Professor Royce's recent suggestive and ironical words are extremely apt:[21] "The true lesson which Japan teaches us to-day is that it is somewhat hard to find out, by looking at the features of a man's face or at the color of his skin or even at the reports of travelers who visit his land, what it is of which his race is really capable. Perhaps the Japanese are not of the

[21] Race Questions and Prejudices and Other American Problems, 1908, p. 14.

right race; but we now admit that so long as we judged them merely by their race and by mere appearance, we were judging them ignorantly and falsely. This, I say, has been to me a most interesting lesson in the fallibility of some of our race judgments." So, also, in his extremely interesting and suggestive paper, "The Causes of Race Superiority," included in the ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, Vol. 18, 1901, Professor Edward A. Ross well said, before emphasizing the real elements of race superiority: "We Americans who have so often seen the children of underfed, stunted, scrub immigrants match the native American in brain and brawn, in wit and grit, ought to realize how much the superior effectiveness of the latter is due to social conditions."

To return, however, to the Chinese exclusion problem: It is apparent that the desire to exclude the Chinese laborer has worked incalculable harm both to them and to us, at least in excluding non-laborers and causing much unnecessary and unintended hardship. If cheap pauper labor, competing on unequal and unfair terms with American labor be involved, such labor can be excluded under general laws, not applicable to the Chinese merely, and not making exclusion the rule and a few enumerated classes of non-laborers the exception. It must be apparent, however, to justify even such reversal of our established beneficent and satisfactory American policy of a century and more, that the danger be general and continuous, and not temporary and spasmodic, and that it is one that cannot be cured by effective distribution, so as to deprive sections needing such labor badly, of the benefits to which they also are entitled. It should take reasonable form, and not be oppressive, unequal and confusing. Nor should it be dictated by spite and caprice, unworthy of a great state or nation, and designed merely to vex and annoy or to discriminate.[22]

Fortunately, President Roosevelt, his Secretary of Commerce and Labor, Mr. Straus, and President Taft, while Secretary of War, have all expressed themselves emphatically on this subject in the

[22]Note California's famous anti-queue law (Ho Ah Kow *vs.* Nunon, 5 Sawyer, 552); her anti-Chinese disinterment law (*In re* Wong Yung Qay, 2 Fed. Rep. 624); her special Chinese tax law (Lee Ging *vs.* Washburn, 20 California, 534), and constitutional prohibition of employment of Chinese by corporations (*In re* Tiburcio Parrot, 1 Fed. Rep. 481), and compulsory removal requirement to new sections (*In re* Lee Sing, 43 F. R. 359), and anti-Chinese-fishing law (*In re* Ah Chong, 2 Fed. Rep. 733).

direction of amelioration of our subsisting Chinese exclusion acts, and the substitution of general laws on the subject, and their utterances accord on this point with those of his Excellency Wu Ting Fang. In the course of an interesting address delivered by the last-named at Ann Arbor University more than eight years ago, the Chinese Minister well said: "The exclusion of Chinese is brought about, you are probably aware, by special and not by general laws. It is a discrimination against the people of a particular country. . . . If, however, it be considered advisable to legislate against the coming of laborers to this country, let such a law be made applicable to all Asiatics and Europeans as well as Chinese. . . . The Chinese immigration question is a complicated one. To solve it satisfactorily is not easy. It is necessary to look deeply into the subject, and not allow oneself to be swayed by prejudice and bias. Prejudice is the mother of mischief, and injustice, and all intelligent men should guard against it."[23] In any event, however, it is only the Chinese laborer that the laws are even intended to exclude, and the laws should obviously be recast so as to exclude merely this particular class and not the whole race, with only a few specified exceptions, making admission the rule, not the exception.

The Chinese boycott of 1905 against American goods called attention forcibly to China's deep resentment of our exclusion policy and of the serious injury it had wrought to our commerce and the imminent danger of reprisals. Our mercantile interests were therefore enabled to compel new and independent consideration of this policy on the part of President Roosevelt and his advisers. On June 24, 1905, President Roosevelt directed a vigorous letter to the State Department, requiring more humane treatment for the Chinese and caused the Department of Commerce and Labor to issue a circular to its subordinates to the same effect. The following October, in an address at Atlanta, he outlined his own policy in the matter, but pointed out that he cannot do all that should be done without action by Congress, action which has not yet been taken. In his message to Congress of December 5, 1905, he said: "In the effort

[23]This address contains a very valuable discussion of the services rendered by the Chinese to America, and combats the economic arguments against Chinese exclusion. I quote it from a pamphlet entitled "Truth versus Fiction, Justice versus Prejudice," also reprinted in Senate Document No. 106, 57th Congress, 1st Session. See also his letter, Senate Document No. 162, 57th Congress, 1st Session, and also the able article by Ho Yow, late Chinese Consul-General at San Francisco, in the "North American Review," September, 1901.

to carry out the policy of excluding Chinese laborers, Chinese coolies, grave injustice and wrong have been done by this nation to the people of China and therefore ultimately to this nation itself. Chinese students, business and professional men of all kinds—not only merchants, but bankers, doctors, manufacturers, professors, travelers and the like—should be encouraged to come here and be treated cn precisely the same footing that we treat students, business men, travelers and the like of other nations. Our laws and treaties should be framed, not so as to put these people in the excepted classes, but to state that we will admit all Chinese, except Chinese of the coolie class, Chinese skilled or unskilled laborers. . . . There would not be the least danger that any such provision would result in the relaxation of the law about laborers. These will, under all conditions, be kept out absolutely. But it will be more easy to see that both justice and courtesy are shown, as they ought to be shown, to other Chinese, if the law or treaty is framed as above suggested."

Secretary Taft was the first official spokesman of the Roosevelt administration to express similar views, on the occasion of an address at Miami University, Oxford, Ohio, on June 15, 1905. He stated that we cannot escape the charge of having broken Chinese treaty rights by our legislation. In the effort to catch in the meshes of the law every coolie laborer attempting illegally to enter the country, we necessarily expose to danger of contumely, insult, arrest and discomfort the merchants and students of China who have a right to come to this country under our treaties. We must continue to keep out the coolies, the laborers; but we should give the freest possible entry to merchants, travelers and students, and treat them with all courtesy and consideration. Two years after the boycott, Mr. Straus, in his first report as Secretary of Commerce and Labor for 1907, said even more specifically: "It has never been the purpose of the government, as would appear from its laws and treaties, to exclude persons of the Chinese race merely because they are Chinese, regardless of the class to which they belong. . . . The real purpose of the government's policy is to exclude a particular and well-defined class, leaving other classes of Chinese, except as they, together with all other foreigners, may be included within the prohibitions of the general immigration laws, as free to come and go as the citizens or subjects of any other nation. As the laws are framed, however, it would appear that the

purpose was rigidly to exclude persons of the Chinese race in general, and to admit only such persons of the race as fall within certain expressly stated exemptions—as if, in other words, exclusion was the rule, and admission the exception. I regard this feature of the present law as unnecessary and fraught with irritating consequences. . . . Laws so framed can only be regarded as involving a discrimination on account of race, and it is needless to point out that discriminations on account of race, color, previous condition or religion are alike opposed to the principles of the republic and to the spirit of its institutions."

In his annual report as Secretary for 1908 he said: "The invidious distinctions, to use an apt phrase, now so apparent on comparing the treatment of necessity meted out to Chinese with the treatment accorded to aliens of other nationalities, in my judgment would not exist but for the fact that the subject of Chinese immigration is distinguished from all other immigration by being dealt with in a separate code of laws, involving a wholly distinct mode of procedure—a mode, moreover, which is at once cumbersome, exasperating, expensive and relatively inefficient. . . . Essentially the entire question involved in the admission or exclusion of Chinese is not a distinct and independent matter of legislative regulation, but in reality is merely a part of the larger problem of immigration."

I cannot conclude better than to quote a stimulating passage recently written by Professor Royce, that distinguished psychologist and student of races, as to the dangers of race discrimination, in a paper on "Race Quesions and Prejudices:" "Let an individual man alone, and he will feel antipathies for certain other human beings very much as any young child does—namely, quite capriciously—just as he will also feel all sorts of capricious likings for people. But train a man first to give names to his antipathies, and then to regard the antipathies thus named as sacred merely because they have a name, and then you get the phenomena of racial hatred, of religious hatred, of class hatred and so on indefinitely. Such trained hatreds are peculiarly pathetic and peculiarly deceitful, because they combine in such a subtle way the elemental vehemence of the hatred that a child may feel for a stranger, or a cat for a dog, with the appearance of dignity and solemnity and even of duty which a name gives. Such antipathies will always play their part in human history. But what we can do about them is to try not to

be fooled by them, not to take them too seriously because of their mere name. We can remember that they are childish phenomena in our lives, phenomena on a level with the dread of snakes or mice, phenomena that we share with the cats and with the dogs, not noble phenomena, but caprices of our complex nature."